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09/824,937	04/03/2001	Lori Greiner	47636.45.1	1540

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EXAMINER

CASTELLANO, STEPHEN J

ART UNIT	PAPER NUMBER
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3727

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/824,937  
Filing Date: April 3, 2001  
Appellant(s): GREINER

**MAILED**  
**APR 26 2006**  
**GROUP 3700**

\_\_\_\_\_  
Katherine M. DeVries Smith  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed October 18, 2004.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

The amendment after final rejection filed on October 18, 2004 has been entered.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

**Patents:**

5,674,546	Barnes et al.	10-1997
5,553,735	Kimura	09-1996
5,275,277	Gallegos	01-1994
2,802,590	Tupper	08-1957

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims and are repeated as stated in the final Office action mailed April 14, 2004:

Claims 15-18, 21-23 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kimura in view of Barnes et al. (Barnes) and Tupper.

Kimura discloses a decorative container displaying items in a hollow region comprising an inner container positioned within an outer container thereby defining a hollow region there between, the outer container is transparent, a removable member (24) allows access to the hollow region. Kimura discloses the container except for the decorative lid. Barnes teaches a decorative

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lid removably mounted in the upper opening of a decorative container, the lid defining a hollow cavity and being transparent, the lid comprising a removable access member providing access to the hollow cavity. It would have been obvious to add a lid in order to close the container and seal the contents from contamination. Kimura in view of Barnes discloses the invention except for lid removable access member being replaceable. Tupper teaches the lid access member (plate A) which is replaceable and removable by groove 25 that is removably and replaceably engaged upon flange 23 of the lid. It would have been obvious to add the groove and flange to Barnes' lid access member and lid, respectively, in order to change the contents and store a refreshed supply of items in the hollow lid cavity.

For claim 17, it would have been obvious to make the transparent shell dome shaped as a matter of design choice in selecting a well known shape.

For claim 18, it would have been obvious to provide a two centimeter distance between the base portion and shell as a matter of design choice in sizing and shaping the container.

Claims 15-18, 21, 22 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gallegos in view of Barnes et al. (Barnes) and Tupper.

Gallegos discloses a decorative container displaying items in a hollow region comprising an inner container positioned within an outer container thereby defining a hollow region there between, the outer container is transparent, a removable member (23) allows access to the hollow region. Gallegos discloses the container except for the decorative lid. Barnes teaches a decorative lid removably mounted upon in the upper opening of a decorative container, the lid defining a hollow cavity and being transparent, the lid comprising a removable access member

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providing access to the hollow cavity. It would have been obvious to add a lid in order to close the container and seal the contents from contamination. Gallegos in view of Barnes discloses the invention except for lid removable access member being replaceable. Tupper teaches the a lid access member (plate A) which is replaceable and removable by groove 25 which is removably and replaceably engaged upon flange 23 of the lid. It would have been obvious to add the groove and flange to Barnes' lid access member and lid, respectively, in order to change the contents and store a refreshed supply of items in the hollow lid cavity.

#### **(10) Response to Argument**

The argument submitted for Kimura in view of Barnes and Tupper is substantially identical to the argument submitted for Gallegos in view of Barnes and Tupper. Kimura and Gallegos both disclose use as drinking vessels. A slight difference in purpose is stated in each. Kimura discloses use as a display of decorations or information. Gallegos discloses a novelty of education or entertainment of an individual, especially children, to entice the individual to drink. Both Kimura and Gallegos disclose the inner and outer containers with a hollow region therebetween, the outer container being transparent and a removable hollow region access member. Therefore, there is no need to separately argue the two grounds of rejection.

Appellant makes two main arguments; (1) the references are non-analogous to each other and (2) there is no motivation to combine these references.

**Non-analogous**

It has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

Appellant notes differences in use and purpose and differences in the materials used to support the reason why the art is non-analogous. Kimura and Gallegos are both drinking vessels. Barnes is used to primarily hold an omelet package. Barnes is certainly capable of holding a beverage and is capable of being lifted and drunk from. Tupper is not capable of being a drinking container. However, Tupper is relevant to the problem solved of storing items in a lid compartment where a replaceable lid access member is provided so that the lid compartment can be opened and closed.

The reasoning set forth by appellant fails to consider the shared purpose of the Kimura, Gallegos and Barnes containers which is to display a decorative or informative appearance with the use of transparent walls. Kimura and Gallegos have a transparent outer wall for displaying decoration or information to entertain or to educate and Barnes has a transparent, outer lid wall for displaying an omelet inlay such as cheese. It is suggested that the display of the omelet inlay is decorative and informative. Kimura, Gallegos and Barnes are also similar in that they all have a double wall construction.

Regarding the difference in materials, appellant submits that the materials used for the Barnes omelet package are disposable while the materials used for the Kimura and Gallegos containers are reusable. Barnes discloses paperboard, paperboard-polymer laminates, foamed

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plastic and polystyrene. Kimura discloses a plastic injection molded material. A so called “disposable” container may be reused by refilling and being drunk from or used to store a liquid. A so called “reusable” container may be used once and disposed of.

The combination of Tupper may not be necessary insofar as Barnes discloses a metal foil or polymer foil (16) capable of holding its shape and being replaced on the upper container. This foil is the removable lid access member and is replaceable. Figure 3 discloses that the peripheral edge of foil (16) becomes pinched between the upper sealing flange (15) of upper container (10) and the beaded peripheral rim at the upper edge of sidewall (22). After first opening the upper container by removing the foil, the foil may be replaced over the bottom open end of the upper container or the upper container inverted upside-down, the foil placed over the opening and the foil with the upper container reattached to the lower container such as shown in Fig. 3.

### **No Motivation**

Appellant argues that there is no motivation to provide a lid to a drinking container and no motivation to provide an upper container to a drinking container. A lid provides coverage and this seals the lower container, prevents contamination, keeps the contents cool and generally preserves the freshness of the lower container. This general concept is what the examiner was trying to convey to appellant when stating “in order to close the container and seal the contents from contamination.” As additional motivation, the lid of Barnes includes a compartment or upper compartment. This compartment adds a separate storage space to the container and allows other items associated with the container to be stored with the container. This is motivation for an upper compartment. The lid of Barnes has many purposes, (1) provide additional storage as



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an upper compartment, (2) seal the lower compartment and (3) seal the upper compartment. The examiner needs only to explain one reason, suggestion or motivation for combining a reference rather than every reason.

The motivation for the Tupper modification is to change the contents or refresh the supply within the upper compartment more conveniently, more quickly and more easily than through the use of the foil which may slip or slide from its position during replacement of the foil.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

**(12) Evidence Appendix**

Appellant sets forth five references in the Brief filed October 18, 2004, Kimura, Barnes Tupper and Gallegos are all cited in the examiner's answer. The fifth reference to Yellin was applied in art rejections but is not involved in any issue before the Board.

Appellant cites two cases in the brief filed October 18, 2004 and another case cited in the reply brief filed June 17, 2005. Receipt of these cases and copies of these cases are hereby acknowledged.


No further action or response is deemed necessary for the references and cases cited.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Stephen Castellano



Stephen Castellano  
Primary Examiner

Conferees:

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Jes F. Pascua *JF*